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No. [redacted] 84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

MOHAWK REFINING CORPORATION, a corporation, and JOHN E. C. STROUD, C. KENNETH JOHNES, and WILLIAM L. ASHBY, individually and as officers of MOHAWK REFINING CORPORATION, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed an order of the Federal Trade Commission requiring petitioners to cease and desist from selling and distributing in commerce lubricating oil re-refined from previously used lubricating oil without affirmatively disclosing to the purchaser the prior use of the raw material used in the re-refining process.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the Federal Trade Commission cease and desist order is not yet reported, but is printed in the Appendix to this petition. The opinion and order of the Federal Trade Commission are not yet reported but are set forth at R. 37-42.[1]

JURISDICTION

The judgment of the Court of Appeals affirming the Federal Trade Commission's cease and desist order was entered March 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners produce re-refined lubricating oils, which are finished motor oils refined in whole or part from previously used lubricating oils. The evidence is undisputed that petitioners' oils are identical in all respects, chemical and physical composition, quality, and utility, with finished motor oils refined wholly from crude or virgin oil, and cannot in any way be told apart from such oils. Petitioners' re-refined oils are sold and identified, like motor oils generally, as motor lubricating oils of specific Society of Automotive Engineers (SAE) viscosity grades, or with particular test specifications, and the raw materials from which they are refined are not indicated. Testimony was adduced by respondent that some dealers and members of the public felt a preference for oil refined from crude oil as against oil refined from previously used oil. These same witnesses generally indicated, however, that this preference was based upon their assumption that a product

[1] "R." references are to the Joint Appendix filed in the Court of Appeals.

made from a previously used material is inferior to a new product, and that it would disappear if the quality of the re-refined oil were in fact the same. These witnesses testified, moreover, that they chose particular motor oils in order to secure satisfactory motor lubrication for the price they could pay, and that they relied upon the brand name of the product and the integrity of the dealer from whom they bought to secure such a satisfactory product. Nevertheless, respondent asserts that the truthful and accurate identification of petitioners' products merely as "motor oils" is a false and deceptive practice under the Federal Trade Commisson Act, in that the public is allegedly misled by such identification into buying such products because of its mistaken belief that such products are "new oils", or oils refined from crude or virgin oil, and accordingly seeks to compel petitioners affirmatively to display and advertise that their motor oils are refined from previously used oil. On these facts, the following questions are presented:

1. When there is made no misstatement or misrepresentation as to the nature, composition, quality, or utility of petitioners' finished motor oils, and there is in fact no difference whatever in nature, composition, quality, or utility of finished oils whether refined from previously used lubricating oils or from crude or virgin oils, does silence as to the particular raw material source of petitioners' oils constitute a violation of the Federal Trade Commission Act so as to authorize an order compelling affirmative disclosure of such raw material source.

2. When a preference which is stated with respect to a product is not a factor inducing consumer purchase or rejection of such product, can failure to reveal facts

relating solely to such verbal preference constitute unfair competition or an unfair or deceptive practice under the Act? Or, put more broadly, can actions, claims, or omissions which do not induce consumer purchase or rejection constitute unfair competition or unfair and deceptive practices in commerce.

3. When a preference which is stated with respect to a product is grounded in a false assumption of its qualitative or utilitarian inferiority or difference, can such a groundless preference, even if it is an inducing factor in purchase or rejection of the product, be in itself a matter of public interest authorizing punitive or preventive action under the Federal Trade Commission Act, absent all other elements grounding such jurisdiction.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) are as follows:

Sec. 5(a)(1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

Sec. 5(a)(6) The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, . . . from using unfair methods of competition in commerce or unfair or deceptive acts or practices in commerce.

Sec. 5(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission

that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect. . . .

STATEMENT

This proceeding was initiated by complaint issued under Section 5 of the Federal Trade Commission Act, as amended, alleging that petitioners violated said Act by engaging in unfair competition and unfair and deceptive acts or practices which mislead the public to buy petitioners' motor oils under the mistaken belief that they are "new oils"; and seeking to compel petitioners to cease and desist from such alleged improper practices.

Petitioners are engaged in the business of refining, blending, compounding, selling and distributing motor lubricating oils, in one-quart and two-gallon containers, and in bulk, both for resale, and to oil blenders and industrial users of oils. (R. 76, 92-93; Resp. Exs. 1, 2, 3, 4, 5). The refining operation, a series of physical and chemical processes including filtration, dehydration, heat, acid, and clay treatments, performed upon a raw material which normally consists of crankcase drainings of previously used lubricating oils, results in a "new oil", identical in all respects, chemical and physical composition, quality, and utility, with any other motor oil, whatever the raw material source, including crude or virgin oil, of such other products. (R. 98-115, 257-260, 303-305, 308). Petitioners' finished oils, like lubricating oils generally, may be sold straight; or compounded with various additives to meet different engine performance requirements; or blended with other finished motor oils, refined either from pre-

viously used oil or from crude or virgin oil, in order to meet varying viscosity specifications established for motor lubricants by the Society of Automotive Engineers (SAE). (Id.) The SAE grade of finished motor oils possessing a certain viscosity is the same whether the raw material source of the finished oil is crude or virgin oil or is previously used lubricating oil. (R. Add. 1; Pet. Ex. 25). In sales of finished motor oils within the oil trade, and to large industrial users of oil, such oils are generally identified only by reference to their objective test specifications, and no identification of raw material source, whether from crude or previously used oil, is made, nor interest evinced therein. (R. 208-209, 216-217, 219-220, 267). The containers in which petitioners' products are sold contain various trade names, SAE grade designations, and statements such as "Quality Controlled by American Society of Testing Materials Approved Laboratory Tests", all of which designations and statements are true and accurate. (R. 230, 246-248)

Respondent relied upon the testimony of a few dealers and members of the public that they would normally assume that oil sold in cans like those used by petitioners was "new oil" (R. 45, 186), and that they felt a preference for "new oil" (R. 45, 147, 167, 171, 183, 202); and respondent concluded that by "new oil" was meant oil refined from crude or virgin oil as distinguished from oil refined from previously used oil (Resp. Opinion, R. 38). These same witnesses, however, generally indicated that they had a preference for "new oil" because they assumed that it was better in quality than oil made from previously used oil, and that they would feel no such preference if in

fact the quality of motor oil refined from previously used oil was the same as that of "new oil". (R. 137, 168, 174, 184, 193, 202-203). Respondent has held, however, that the quality of petitioners' oils was not material to the issues of the instant proceeding. (R. 34, 40).

Based upon this testimony, the respondent held that petitioners' omission to label their products as made from previously used motor oils misled the public into purchasing such products under the mistaken belief that they were refined from crude or virgin oil, and hence that such silence was unfair competition and an unfair or deceptive practice under the Act. An order thereupon issued directing petitioners to cease and desist from selling their products in commerce unless they affirmatively disclosed the prior use of the raw material from which their finished products were refined (R. 42).

The Court of Appeals below expressly stated that the fact that petitioners' oils are as satisfactory for lubricating purposes as oils produced from crude oil, though true, was beside the point, and, quoting from the opinion of this Court in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, to the effect that a consumer has a right to secure the product of his choice, even if his choice is dictated by caprice or ignorance, affirmed the Commission's order.

REASONS FOR GRANTING THE WRIT

1. The Court Below, and the Federal Trade Commission, Have Extended to Distortion Prior Applicable Decisions of This Court, and Have Thus Improperly Decided an Important Question of Federal Law Which Has Not Been But Should be Settled by This Court.

The Commission seems to regard its authority under Section 5 of the Federal Trade Commission Act as broad enough to permit prohibition both of

> ". . . explicit misrepresentation and *failure to disclose by mark or label facts concerning merchandise, which, if known to prospective purchasers, would influence their decisions of whether or not to purchase . . .*" Brief of Respondent, filed in Court below, p. 21. (Emphasis supplied).

Such extreme authority to compel product labeling with information of whatever kind might be deemed to be of possible interest to prospective purchasers may be regarded by some as useful or desirable, but there is room for grave doubt whether Congress, in enacting Section 5, or the courts in construing and applying it, have thus broadly conceived its scope and purpose.

The courts have properly ruled that any affirmative misstatement, even as to matters unrelated to the quality or utility of the product, grounds governmental intervention under the Act to prevent continued misrepresentation. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (false implication in company name that it was engaged in actual grinding of flour, whereas it was in fact only a jobber or distributor); *Federal Trade Commission* v. *Algoma Lumber Co., supra*, (sale of "yellow pine" under the name of "California white pine"); *Federal Trade*

Commission v. *Walker's New River Mining Co.*, 79 F. (2d) 457 (C.A. 4) (misleading implication in company name that its coal came from the "New River" coal field); *Haskelite Manufacturing Company* v. *Federal Trade Commission*, 127 F.(2d) 765 (C.A. 7) (advertising of lap trays surfaced with paper as having a hardwood surface). But in the instant case there has admittedly been no affirmative misstatement of any kind, either in the description of the product, its quality, utility, grade, source, or any other matter in connection therewith.

In many proceedings before it, the Commission has ruled that used products or parts sold in or incorporated into new packages under circumstances implying, even though not expressly stating, that the products themselves were wholly new, were being sold under a form of deception warranting prohibitive action. *Gilman Hat Company*, 17 F.T.C. Dec. 352 (used hat bodies, cleaned, blocked, and sold with new hat band); *A. S. Butler & Co.*, 31 F.T.C. Dec. 1011 (used glass jars, cleaned, packed in new cartons, and sold with new tops and rubber bands); *Federal Cordage Co., Inc.*, 49 F.T.C. Dec. 1312 (used manila rope fibers reclaimed and made into rope sold in containers marked "manila"); *M. & M. Spring Co.*, 50 F.T.C. Dec. 207 (used automobile spring parts sold with new cover). But in these cases the quality of the product or part after use was different from, and inferior to, the new product which it purported to be, and the Commission expressly so found as a fact and relied thereon. Here, however, the generally valid assumption that products deteriorate with use, which was applied in such cases, does not obtain. The evidence is uncontroverted that oil does not wear out with use but merely becomes

contaminated, and that re-refining restores it to its original characteristics as a motor oil (R. 251, 275); and hence that motor lubricating oil refined from previously used oil is identical in all respects with and wholly indistinguishable from motor lubricating oil refined from crude or virgin oil, as to composition, quality, and utility. See Opinion of Court below, App. 1a, Resp. Opinion, R. 38; R. 98-115.

In the *Algoma* case, *supra*, this Court, upholding a cease and desist order clearly grounded in overt misrepresentation of "yellow pine" as "white pine", met the argument that substantial equivalence in the utility of the two products prevented action under the Act, by enunciating the right of a consumer to protection against any misrepresentation or other hindrance in the free exercise of his buying choices, whether or not such choices were grounded in ignorance, or caprice, even if no substantive harm were involved in the denial of or substitution for his expressed choice. But crucial —by definition—to such right to protection is the fact of a consumer choice among various items on some basis which would induce the purchase or rejection of one or more of these items, however irrelevant or insubstantial from an objective point of view the choice-inducing factor might be. Only where, as in the cases cited above, the hindrance to free choice is created by overt misrepresentation or deception, whether verbal or by deliberate substitution of one product for a different, desired, product, has the specific exercise of a choice or an objectively meaningful basis therefor, not been required to be shown.

But here the evidence clearly demonstrated that, whatever the customer's verbal "preference" for oil refined from crude oil as distinguished from re-refined

oil, there was in fact no exercise of choice based on such factor, and that the factors inducing choice did not include considerations of raw material source; the choice-inducing factors were rather price, quality, brand-name, and the integrity of the dealer. (R. 50, 140, 154-156, 164-165, 173, 180-181, 186, 189, 197-198, 202, 270-272, 288-289.) In the face of absence of any overt misstatement, or evidence of inferiority or even difference between petitioners' products and so-called "new oils", the ruling here extends far beyond all prior rationales for prohibitive action under Section 5 of the Act, and in so doing dangerously distorts the purpose of the Act and unreasonably interferes with trade and business practices and relationships.

In essence, the Court below and the Commission hold that, absent any other basis for jurisdiction, seller-silence as to any question which any consumer might ask regarding a product, whether or not the question is asked and whether or not the answer would induce purchase or rejection of the product, whether or not it would reveal an objectively significant fact concerning the product, and whether or not it would expose or prevent imposition of an untruth, can and does constitute unfair competition and an unfair and deceptive act or practice thwarting the right of "choice" of the consumer. By so holding, this case translates the Federal Trade Commission Act into a super-labeling act, covering grades, quality, costs and any other factor in which the Commission might deem a consumer would have an interest, contrary to the intent and purpose of the Act.

This is the issue which deeply troubles Judge Breitenstein, dissenting in *Frank A. Kerran, et al.* v. *Federal Trade Commission*, No. 5850, (C.A. 10), de-

cided March 19, 1959, a case which is virtually a factual duplicate of the instant matter. (The opinion is not yet reported, and is reprinted in the Appendix hereto, p. 9a). The language in which Judge Breitenstein summarizes the effect of the decision therein is equally applicable here, that it compels

> "... a manufacturer [not only to] foresee caprice and ignorance and ... refrain from misrepresentation but also affirmatively [to] state every fact regarding his product which might conceivably be deemed important by the prejudiced and uninformed. ..." (App. 16a)

There is room for serious doubt whether this Court would have held the Algoma Lumber Company guilty of misrepresentation or deception if it had sold its products merely as "pine", and neither as "white pine" or as "yellow pine"; just as here petitioners truthfully and fully describe and sell their products as motor lubricating oil, and not as oil refined from crude oil. To permit seller-silence as to a product's raw material source, when it admittedly has no objective effect upon the composition, quality, or utility of the finished product, to ground injunction of such silence as a deceptive and illegal practice, and when no other basis for finding of misrepresentation or deception exists, is to expand the scope of Section 5 of the Act to encompass total control of all business advertising and sales methods, far beyond possible relation to prevention of genuine fraud or deception as originally contemplated thereby, and hence is to decide a question which this Court has not decided. The opinion of the Court below, and the divided opinions of the Court of Appeals for the Tenth Circuit sharply point the issue which this Court should decide, as seriously affect-

ing the proper scope of administrative authority under the Federal Trade Commission Act to control reasonable and truthful business practices.

2. The Doctrine Here Applied, That It Is in the Public Interest to Protect a Consumer in the Exercise of a Choice, Even if Such Choice Is Admittedly Grounded in a False Factual Assumption, Is of Very Questionable Propriety as a Basis for Governmental Control and Inhibition of Objectively Reasonable, Fair and Truthful Trade Practices, and Should be Reexamined and Limited by This Court.

If, contrary to fact, it should be assumed that the public has a genuine, choice-inducing preference for oil refined from crude oil as distinguished from re-refined oil, a basic question is raised under the Act whether it is in the public interest to protect such a preference even if it is in fact grounded in falsity.

Admittedly, if such a preference is actually expressed by a consumer, any thwarting thereof without disclosure is properly actionable.

The core of the issue here, however, relates to a silent preference, which the dealer at his peril is charged with ascertaining and honoring. Under such circumstances, the fact that the preference involved is factually groundless, that the preference is for Tweedledum as against Tweedledee, should weigh heavily in the determination whether, in meeting the requirements of the Act for exercise of injunctive jurisdiction, the public interest is affected. The public seeks, requests, secures, a motor oil; and whether that oil is derived from crude oil or from previously used oil, the product secured is, in all respects, that which the public has requested, and not merely one substantially equivalent thereto.

It is submitted that, within the contemplation of the Act, protection of factually unwarranted assumptions and preferences is not in the public interest: unless some affirmative action is taken to thwart consumer desire, or unless some actual product difference exists which, however, slightly, can cause or constitute objective prejudice or harm to the purchaser, or unless some clearly expressed public policy compels general recognition of the existence of a consumer preference;[2] and hence that such unwarranted assumptions and prejudices should not be protected.

The public interest is not well served by devotion of public funds, personnel, and time to harassment of truthful and legitimate small businesses under a statute basically designed to afford consumer protection against substantial fraud, when the ultimate effect of such governmental action is objectively meaningless. This Court should so instruct the Federal Trade Commission.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted.

SEYMOUR FRIEDMAN
Attorney for Petitioners

May, 1959

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[2] *Cf. L. Heller & Son, Inc.*, v. *Federal Trade Commission*, 191 F. (2d) 954 (C.A. 7), compelling disclosure of the foreign origin of products sold. Here, however, the assumption of a general preference is valid as a basis for action since it is expressed as a matter of national policy in the tariff laws requiring marking of imported goods. 19 U.S.C. 1304. *Cf.* Judge Breitenstein, dissenting, in *Frank A. Kerran* v. *Federal Trade Commission*, *supra*, App. 15a, 16a.

APPENDIX.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,606

MOHAWK REFINING CORPORATION, a Corporation, and JOHN E. C. STROUD, C. KENNETH JOHNES and WILLIAM L. ASHBY, Individually and as Officers of MOHAWK REFINING CORPORATION, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION.

Argued November 21, 1958

Before BIGGS, *Chief Judge*, and MARIS and MCLAUGHLIN, *Circuit Judges*.

OPINION OF THE COURT

(Filed February 12, 1959)

By BIGGS, *Chief Judge*.

The Federal Trade Commission charged that the petitioners, in violation of Section 5(a) of the Federal Trade Commission Act, 66 Stat. 632, 15 U.S.C. § 45(a)(1952), engaged in the business of "reclaiming used motor oil and in selling and distributing such lubricating oil, or a blend of such oil and new oil, in [interstate] commerce to jobbers and dealers for resale to the purchasing public"; that the

petitioners' oil consisted "in whole or in substantial part of used motor oil, obtained from drainings of motor crankcases and from other sources, which has been reclaimed by subjecting the used oil to a treatment designed to remove the impurities therefrom"; that the petitioners' "[O]il . . . [was] sold in containers of the same general size, kind and appearance as those used for new oil, and has the appearance of new and unused oil"; that "The containers have no markings of any kind indicating that . . . [the] product is reclaimed used oil"; and that the petitioners' practices mislead the dealers who in turn mislead the purchasing public into believing erroneously that the petitioners' oil is "new oil."

The proof offered before the Hearing Examiner demonstrates that the petitioners do not engage in the business of "reclaiming" used motor oil except as a necessary preliminary to their re-refining process, and that the petitioners' finished product results from a series of processes which may be defined as re-refining crankcase drainings of previously used lubricating oils to produce a finished motor lubricating oil though sometimes the oil re-refined is blended with "crude" oil not used prior to its use by the petitioners and sometimes called virgin oil.[1] It appears also that the petitioners' lubricating oil is sold by them in interstate commerce under various brand names in containers which do not disclose that the oil is re-refined from used oil and that many purchasers have been deceived or misled into buying the petitioners' oil thinking it to be oil refined from crude oil, virgin oil, not oil previously used in motor crankcases; that during each of the years 1954 and 1955 the petitioners sold approximately two million gallons of oil, from which they realized about $500,000; and that of this total between 75% and 90% represented oil produced by the

[1] Both witnesses and counsel, the Hearing Examiner and the Commission, on occasion have used the term "new oil" to refer to lubricating motor oil refined from virgin oil, crude oil and have employed the term "used oil" to refer to lubricating motor oil re-refined from used crankcase oil

petitioners by their re-refining processes as distinguished from crude oil purchased by them for blending purposes; and that the sales of the petitioners in interstate commerce were substantial and in competition with individuals, firms and corporations engaged in the production and sale of lubricating oil.

The record also shows that the Society of Automotive Engineers' viscosity rating of the petitioners' oils was up to the standards required by the trade, and no charge or implication was or is made that their oil was lacking in lubricating qualities, in efficiency, or in adaptability for the purpose for which it is sold, or was in any respect inferior to lubricating oil refined from crude oil, virgin oil. The proof shows also that many jobbers and members of the purchasing public prefer to buy oil refined from crude oil, virgin oil, as opposed to oil such as the petitioners' which has been re-refined from oil previously used, and that the public buys motor oil largely on the basis of price, believing that higher priced oils will give better service in a motor vehicle.

The Commission entered an order requiring the petitioners forthwith to cease and desist "from representing . . . that their lubricating oil is refined or processed from other than previously used oil" and from advertising, offering for sale or selling oil which has been "reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising, in sales promotion material, and by a clear and conspicuous statement to that effect on the container." The petition to review followed.

The petitioners attack the opinion and the final order of the Commission as arbitrary and capricious and contend that each lacks substantial supporting evidence. They assert also that the Commission erred as a matter of law in holding that the failure to disclose the source or origin of the petitioners' finished product was a violation of Section 5 of the Federal Trade Commission Act. The petitioners contend as well that the Commission committed prejudicial

error in excluding from the record the testimony of certain witnesses and exhibits offered by them and in refusing to permit them to examine certain Commission records and correspondence on which, it is alleged, the Commission wrongfully relied.

It will be observed that there was a variance between the charge set out in the complaint and the proof in that the Commission charged the petitioners with selling "reclaimed" oil, as distinguished from "re-refined" oil. Even were the proceedings before the Commission conducted as strictly as a suit at law this variance would be deemed too insubstantial to be material. The evidence offered by the Commission's witnesses demonstrated that the petitioners produce their lubricating oil by re-refining and that the factor of reclamation was a minor one. The evidence shows also that without notification to the trade and to the customer that the petitioners' oil was not manufactured from crude oil, virgin oil, many persons in the trade and individual customers thought that the petitioners' product was manufactured from crude oil. The record proves further that such persons preferred to distribute and sell and to buy lubricating oil manufactured from crude oil or virgin oil, and not oil re-refined from crankcase oil, and thought that they were doing so. Accordingly, there was sufficient evidence upon which the Commission could find that dealers and the purchasing public were misled by a mistaken belief that petitioners' products were derived from crude oil.

It is true, as the petitioners point out and as the Commission found, that the petitioners' oil is as satisfactory for lubricating purposes as lubricating oil produced from crude oil or virgin oil, but this is beside the point. As was said by the Supreme Court through Mr. Justice Cardozo in Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 77-78 (1934): "We have yet to make it plain that the substitution would be unfair though equivalence were shown. . . . The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. . . . In such matters, the public is entitled to get what it chooses, though

the choice may be dictated by caprice or by fashion or perhaps by ignorance. . . . Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightfully named, are diverted to others whose methods are less scrupulous." Moreover, it does not serve to palliate the petitioners' offense by the fact that their sin was one of omission in failing to label the containers or make known to the purchasers that their oil was not produced from crude oil. Chief Judge Parker put this succinctly in P. Lorillard Co. v. Federal Trade Commission, 186 F.2d 52, 58 (4 Cir. 1950), when he said: "To tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished."

The petitioners assert as a defense that there was no showing here of a specific and substantial public interest because their products are identical with all other finished motor oils as to composition, quality and utility and hence no harm can come to the purchasers or to the public generally. But as has been indicated the public is entitled to buy what it chooses. A manufacturer may not surreptitiously substitute his judgment for that of the purchaser as to the article to be purchased, even if the manufacturer's judgment is equal or even superior to that of the dealer or the customer. If this were not so, the substituted judgment of the manufacturer would always prevail over the will of the dealer or customer and the provision of the statute prohibiting unfair and deceptive practices would be emasculated. The public has the right to purchase motor oil manufactured from crude oil, if it desires to do so, and that desire may not be balked by a failure to disclose pertinent facts.

For the reasons stated the Commission did not err in striking from the record evidence of two expert witnesses of the petitioners who testified that it was not the industry practice to disclose to the trade or to the purchasing public

the sources of motor oils and that these are bought and sold on the basis of grades established by the Society of Automotive Engineers and service classifications made by the American Petroleum Institute. These facts are immaterial to the issue raised by the Commission or on the instant appeal. The fact that some dealers and some customers were not misled by the petitioners' practices, even if such persons were in large numbers, is irrelevant. As we have said the record amply demonstrates a desire on the part of the dealers and purchasing public not to dispense or buy motor oils re-refined from crankcase drainings. Cf. Federal Trade Com'n v. Winsted Co., 258 U.S. 483 (1922) and Independent Directory Corp. v. Federal Trade Com'n, 188 F.2d 468, 471 (2 Cir. 1951).

The petitioners also contend that the Commission committed error by withholding from them and from the record in the instant case correspondence between the Commission's staff and witnesses who appeared on behalf of the Commission. They assert that by such correspondence witnesses testifying on behalf of the Commission on the factual issue as to whether or not the public had a preference for motor oils refined from crude oil, virgin oil, as distinguished from motor oils re-refined from crankcase drainings, might have been and were unduly influenced. The petitioners assert also that, being deprived of this correspondence they were limited in their cross-examination.

The hearings before the Hearing Examiner began on September 20 and were concluded on December 11, 1956, being held on six different days. The fourth day of hearing was November 20. It then appeared, apparently for the first time, that witnesses appearing on behalf of the Commission had received the letters referred to. On that day petitioners' counsel moved orally that the Hearing Examiner require the Commissioner to produce all the correspondence.[2] The Hearing Examiner stated that though

[2] One letter, dated October 11, 1956, from the Federal Trade Commission to Topline Store was produced by trial counsel for the Commission from his file and was introduced as respondent's (here

he felt that the correspondence should be produced that he could not require the Commission to produce it. It was not until April 26, 1957 that the petitioners filed a motion with the Hearing Examiner that the correspondence should be produced and incorporated in the record. The matter was referred to the Commission. The Commission, by an administrative order dated May 10, 1957, denied the motion, stating that the information sought was confidential and the correspondence could be released only pursuant to the provisions of the Commission's Rules, Section 1.134(b).[3]

We cannot say that "good cause" was shown as to why the correspondence should have been produced. Petitioners' assertion that there was actual influence exerted by the Commission through the correspondence is not supported by the record. Petitioners' reference to testimony of witnesses who had received questionnaires establishes no more than that the witnesses were made aware through the questionnaires of re-refined, reprocessed, or reclaimed oil as distinguished from crude, virgin, oil.

Moreover, the formal motion for production and incorporation in the record was not made to the Hearing Examiner until more than four months after the termina-

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petitioners') exhibit No. 1. It is in the form of a questionnaire and dealt in substance with the issue of whether or not the motor oil was invoiced to Topline as re-refined oil and whether it was represented by Topline to its customers as re-refined oil and similar questions, with Topline's answers thereto.

[3] 16 C.F.R. § 1.134 (Supp. 1958) states: "§ 1.134 *Release of confidential information.* (a) Upon good cause shown, the Commission may by order direct that certain records, files, papers, or information be disclosed to a particular applicant.

"(b) Application by a member of the public for such disclosure shall be in writing, under oath, setting forth the interest of the applicant in the subject matter; a description of the specific information, files, documents, or other material inspection of which is requested; whether copies are desired; and the purpose for which the information or material, or copies, will be used if the application is granted. Upon receipt of such an application the Commission will take action thereon, having due regard to statutory restrictions, its rules, and the public interest."

tion of the hearings and nearly one month after the petitioners had submitted proposed findings of fact and conclusions of law to the Trial Examiner. The validity of the Commission's Rules of Practice is not questioned by petitioners and in view of the delay it was not error for the Commission, relying upon Section 1.134(b), to deny the motion. Cf. NLRB v. General Armature & Mfg. Co., 192 F.2d 316 (3 Cir. 1951); NLRB v. Adhesive Products Corp., 258 F.2d 403, 406 (2 Cir. 1958).

We can perceive no error in the Commission's decision. Consequently, it will be affirmed. An appropriate judgment will be entered in this court requiring the petitioners to comply with the order of the Commission.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(Federal Trade Commission Docket 6432)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

November Term, 1958

No. 5850

FRANK A. KERRAN and CAMERON A. KERRAN, Individuals and Copartners Trading and Doing Business as DOUBLE EAGLE REFINING COMPANY, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

JOSH LEE (JOHN B. OGDEN was with him on the brief) for *Petitioners*.

E. K. ELKINS (EARL W. KINTNER, *General Counsel*, and JAMES E. CORKEY, *Assistant General Counsel*, were with him on the brief) for *Respondent*.

Before BRATTON, *Chief Judge*, and PICKETT and BREITENSTEIN, *Circuit Judges*.

BRATTON, *Chief Judge*.

This proceeding is here on petition to review an order of the Federal Trade Commission. Petitioners Frank A. Kerran and Cameron A. Kerran, partners doing business under the trade name of Double Eagle Refining Company,

at Oklahoma City, Oklahoma, are engaged in the business of re-refining previously used lubricating oil, principally crankcase drainings collected at gasoline stations; packaging the re-refined oil in tin cans of the same general size, kind, and appearance as those used for packaging lubricating oil produced directly from virgin crude; and selling the re-refined oil without indicating on the containers or otherwise that the commodity is produced from previously used oil. Some of the supply of previously used oil comes to the refinery of petitioners from other states, and some of the finished product is sold and distributed in interstate commerce. The order of the Commission required petitioners to cease and desist from representing, contrary to fact, that their lubricating oil is refined or processed from other than previously used oil; and from advertising, offering for sale, or selling lubricating oil that is composed in whole or in part of oil which had been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and sales promotion material, and by a clear and conspicuous statement to that effect on the container.

The order is challenged upon the ground that the Commission erred in holding that the methods of competition employed by the petitioners are unfair, because the Commission did not base its decision upon all of the pertinent facts of record but upon only a minor part of them; because there is little likelihood that the public is misled since re-refined oil is identical to that which is refined directly from virgin crude; because when previously used oil is re-refined it loses its identity as previously used oil and is new oil in every sense of the term; and because the circumstances which must accompany seller silence in order for it to constitute an unfair method of competition are not present in the proceeding. It is the position of petitioners that lubricating oil does not wear out; that use does not change the chemical composition of the oil or its molecular structure but merely contaminates it; that contamination from use as well as additives put into the oil by the prior producer

are eliminated by the re-refining process; that the re-refined oil which petitioners sell is new oil; and that such re-refined product is the equivalent in quality of lubricating oil produced from virgin crude. Evidence was adduced at the hearing before the hearing examiner to the effect that lubricating oil does not wear out with use; that use does not change the chemical composition of the oil or its molecular structure but merely contaminates it; and that contamination from use as well as additives put into the oil by the prior producer are eliminated by the re-refining process. But the hearing examiner in the first instance found in effect that a substantial portion of the public who purchase lubricating oil prefer new and unused oil to that produced by the re-refining of crankcase drainings and other previously used oil; that the failure of petitioners to disclose that their oil is made from previously used oil has a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the belief that such oil is new and unused made from virgin crude oil; and that such failure has a tendency and capacity to cause such members of the public to purchase petitioners' oil as a result of the erroneous and mistaken belief so engendered. These crucial findings were adopted by the Commission. They were adequately sustained by evidence adduced upon the hearing and therefore must stand on review. It may be that lubricating oil does not wear out with use. It may be that use does not change the chemical composition or molecular structure of oil. It may be that contamination from use and additives put into oil by the prior producer are eliminated by the re-refining process of petitioners. And it may be that the oil sold by petitioners is just as good in quality as lubricating oil produced from virgin crude. But the public is entitled to know the facts with respect to the lubricating oil sold by the petitioners being produced from previously used oil and then make its own choice with respect to purchasing such oil or oil produced from virgin crude, even though the choice is predicated at least in part upon ill-founded sentiment, belief, or caprice. Federal Trade Com-

mission v. Algoma Lumber Co., 291 U.S. 67. And therefore the practice of the petitioners in marketing their re-refined lubricating oil in containers indistinguishable from those used generally to market lubricating oil refined from virgin crude, without any disclosure that it is made from previously used oil, constitutes a deceptive practice within the intent and meaning of section 5(a) of the Federal Trade Commission Act, as amended, 52 Stat. 111, 15 U.S.C.A. §45(a). Mohawk Refining Corp. et al. v. Federal Trade Commission, CA-3, ...F.(2d)....; Royal Oil Corp., et al. v. Federal Trade Commission, CA-4, ...F.(2d)....

Petitioners urge further that the order of the Commission is invalid because the purchasing public is not prejudiced by their methods of competition since the public preference is for quality in lubricating oil and not for any particular origin; because the competitors of petitioners are not prejudiced by the methods of competition which petitioners practice since petitioners do not enjoy any unfair advantage over their competitors; because enforcement of the order would result in actually restricting competition since it would destroy the business of petitioners and other re-refiners and thereby eliminate them as potential competitors of the major oil companies; because it is contrary to public policy to require useless disclosures which would result in injury to a company engaged in the business of re-refining oil and selling it in interstate commerce; and because it would result in wasting unnecessarily a precious natural resource. The general trend of the argument in support of the several grounds of challenge to the order is that the practices of petitioners do not prejudice the public; that they do not prejudice the competitors of petitioners; that disclosure would result in injury to the business of petitioners; and that disclosure would result in waste of a natural resource. But section 5(a) of the Act, supra, as amended in 1938, declares unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce to be unlawful; and with exceptions not having any present material bearing, it empowers the Commission to

prevent such methods, acts, or practices. Under the statute, as amended, the Commission is vested with power to prevent the use of unfair methods of competition in commerce and also to prevent the use of unfair or deceptive acts or practices in commerce. Under the enlarged sweep of the statute, the Commission may take appropriate action to prevent unfair or deceptive practices in commerce which are inimical to the public interest. Thomas v. Federal Trade Commission, 116 F.(2d) 347; Wolf v. Federal Trade Commission, 135 F.(2d) 564; Globe Cardboard Novelty Co. v. Federal Trade Commission, 192 F.(2d) 444; Koch v. Federal Trade Commission, 206 F.(2d) 311. The vice in the acts and practices of petitioners lies in the deception of the purchasing public of lubricating oil with respect to the oil sold by petitioners being re-refined oil instead of refined oil from virgin crude. And that vice constitutes an unfair and deceptive business practice within the intent and meaning of Section 5 of the Act, supra. Mohawk Refining Corp. et al. v. Federal Trade Commission, supra; Royal Oil Corp. v. Federal Trade Commission, supra.

A decree will be entered affirming and enforcing the order of the Commission.

BREITENSTEIN, *Circuit Judge* (dissenting).

The majority opinion sustains the Federal Trade Commission in requiring the manufacturer of an admittedly high quality domestic product to disclose in its advertising and on its container labels the source of its product. It does so in the absence of any claim that such manufacturer has ever made a deceptive or misleading statement in connection with the marketing of the product, re-refined lubricating oil. A deceptive practice is said to result from the marketing of the product "in containers indistinguishable from those used generally to market lubricating oil refined from virgin crude, without any disclosure that it is made from previously used oil." The deception is inferred from the assumption that the buying public prefers a lubricant produced from so-called virgin crude oil.

Certain facts shown by the uncontradicted evidence are pertinent. After crude oil is taken from the ground it is refined first to secure the more volatile distillates such as gasoline. The residuum is then refined again to obtain lubricating oils. Oil does not lose its chemical composition or its molecular structure by use. It does not wear out. The petitioner takes oil which has been drained from automobile crankcases and refines it just as the residuum of crude oil is refined after the capture of the more volatile distillates. The product so obtained has as high quality as that obtained from the residuum of the gasoline distillation.

Many minerals are processed and reprocessed and used and reused over and over again.[1] In this regard oil is no different from iron, gold and silver. The saving, accumulation, reprocessing and re-use of dental gold, silver ornaments and automobile steel does not differ in basic concept from the similar operations in regard to oil disclosed by this record. The assumption that a purchaser is deceived when he buys a good oil derived from a secondary processing operation is no different from an assumption that a purchaser of a new automobile is deceived if the steel in that automobile has been derived from the processing of scrap iron obtained from a junk yard.

Section 5(a) of the Federal Trade Commission Act, as amended,[2] empowers and directs the Commission to prevent the use of "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." Here the unfair method and the unfair or deceptive practice are said to arise from the use of the same type container as that used by the manufacturers who produce from virgin crude and from the failure to disclose on the container that the lubricant is produced from previously used oil. There is nothing unfair or deceptive in using the same, common tin can type of container that is used for a multitude of

[1] The most common use and re-use of a natural resource probably occurs in the utilization of water.

[2] 15 U. S. C. § 45(a).

products. The action of the Commission depends solely on the fact that the source of the oil is not disclosed.

With due deference to administrative expertness in fact finding, I see nothing in the record to sustain a finding that the public prefers lubricating oil produced from virgin crude. As testified, in substance, by the only witness who covered the attitude of the public,[3] the purchaser desires quality and buys by brand names. Granting that a purchaser is entitled to get what he asks for, even if he is put off with something as good or better,[4] quality is material in determining whether there is customer deception in circumstances where there is no misrepresentation. The fact that a buyer desires a good oil or a brand oil does not mean that he has any interest in the origin of that oil. The assumption that the public prefers a lubricant produced from virgin crude does not follow from the fact that the public seeks to buy a good oil. Yet the Commission makes such an assumption and from it finds a deception.

The product involved here is admittedly of high quality and the petitioner has admittedly made no false statements in regard to either the product or its use. Hence this is not a case for the Commission to exercise its well-recognized negative power of preventing falsity by forbidding certain conduct. Instead it is one where the Commission exercises an affirmative power to require a statement as to origin for the prevention of a falsity which is not shown to exist.

In the foreign origin cases the power of the Commission to require an affirmative disclosure of origin has been upheld.[5] In such cases the assumption of a popular preference for homemade goods is entirely reasonable and is supported

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[3] The witness, a distributor for a major oil company, was called by and testified for the Commission.

[4] See Ohio Leather Co. v. Federal Trade Commission, 6 Cir., 45 F. 2d 39, 41.

[5] Eg. L. Heller & Son v. Federal Trade Commission, 7 Cir., 191 F. 2d 954; American Tack Co. v. Federal Trade Commission, 2 Cir., 211 F. 2d 239.

by the provision of the tariff laws requiring the marking of imported goods with the name of the country of origin.[6]

Royal Oil Corporation v. Federal Trade Commission, 4 Cir., ... F.2d ..., involves reclaimed, not re-refined oil,[7] and did not discuss the issues raised in this case. It is obvious that the sale of reclaimed oil without appropriate disclosure may be a deception. The same conclusion does not follow when the oil is re-refined as then the quality is as high as that found in oil produced from virgin crude.

Mohawk Refining Corporation v. Federal Trade Commission, 3 Cir., ... F.2d ..., affirmed an order similar to that involved here and did so in a case concerning re-refined oil. Reliance was placed on the statement in Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 78, that the public is entitled to get what it chooses, though the choice be dictated by caprice or ignorance. Algoma was a case of mislabeling.[8] Neither in Mohawk nor in the case at bar was there any false labeling. Although the right to make a capricious or ignorant choice is protected against misrepresentation, the recognition of such right does not require that a manufacturer foresee caprice or ignorance and not only refrain from misrepresentation but also affirmatively state every fact regarding his product which might conceivably be deemed important by the prejudiced and uninformed.

Mohawk quotes approvingly from P. Lorillard Co. v. Federal Trade Commission, 4 Cir., 186 F.2d 52, 58, that: "To tell less than the whole truth is a well known method of deception ..." The validity of such statement is unquestionable but it has no applicability. The omission here of the statement of source has no relation to the quality or usability of the product. Nondisclosure may amount to a

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[6] See 19 U. S. C. § 1304.

[7] Reclaimed oil is used oil which has been strained or otherwise treated to remove contaminants. Re-refined oil is oil that has been produced by a refining process similar to that used in producing oil from virgin crude.

[8] "Yellow pine" lumber was falsely labeled as "white pine."

deceptive practice when it is accompanied by an affirmative act calculated to deceive, when it has a bearing on quality or usability, or when the nondisclosed facts pertain to national policy. None of these situations is found here.

It may be that advertisements and labels should be much more informative than they ordinarily are in current custom and practice. But Congress has never given to the Commission unrestricted power affirmatively to require informative statements. Its pertinent power is limited to the prevention of unfair methods of competition and unfair or deceptive acts or practices in commerce. Granting that the Commission is the expert body to determine the remedy necessary to eliminate such methods or practices,[9] nevertheless, the affirmative function of requiring informative disclosures may only be exercised to prevent unfairness or deception.[10] Believing as I do that nondisclosure of source of origin of product, standing alone and unaccompanied by any of the factors which I have mentioned, does not constitute unfairness or deception, I am brought to the conclusion that there is no rational basis for the findings, and no legal basis for the order, of the Commission. It is not necessary to comment on the far-reaching implications of the Commission's action under present conditions wherein scientific advances establish methods of reprocessing without loss of quality and thus permit the use and re-use of many substances which are in limited supply.

I most respectfully dissent from the opinion of my associates.

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[9] Jacob Siegel Co. v. Federal Trade Commission, 327 U. S. 608, 612.

[10] Cf. Alberty v. Federal Trade Commission, D. C. Cir., 182 F. 2d 36, 39, cert. denied 340 U. S. 818.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 84

MOHAWK REFINING CORPORATION, A CORPORATION, AND JOHN E. C. STROUD, C. KENNETH JOHNES, AND WILLIAM L. ASHBY, INDIVIDUALLY AND AS OFFICERS OF MOHAWK REFINING CORPORATION, PETITIONERS

v.

FEDERAL TRADE COMMISSION

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals affirming the Federal Trade Commission (Pet. 1a–8a) is reported in 263 F. 2d 818. The opinion and order of the Commission are set forth in the Joint Appendix (R. 37–42).[1]

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] References are to the Joint Appendix printed for the use of the Court of Appeals and filed by petitioners in this Court pursuant to Rule 21 (3) and (4).

QUESTION PRESENTED

The Federal Trade Commission enjoined the sale or distribution of petitioners' motor oil, which was re-refined from used oil, in the absence of an affirmative disclosure in petitioners' advertising and on the containers in which the oil was sold that it was produced from used rather than crude oil. It found that, although there is no demonstrable difference between the quality of petitioners' oil and oil refined from crude oil, there is a public preference on the part of both dealers and motorists for oil refined from crude oil, and that sale of petitioners' product, without disclosure of the fact that it is refined from used oil, has the tendency and capacity to deceive its purchasers.

The question presented is whether, under these circumstances, the Commission could properly conclude that the failure of petitioners to make an affirmative disclosure of the source of their oil constituted an unfair method of competition or an unfair or deceptive practice under Section 5 of the Federal Trade Commission Act.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) are as follows:

> Sec. 5(a)(1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * * *
>
> Sec. 5(a)(6) The [Federal Trade] Commission is hereby empowered and directed to pre-

vent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * * * *

STATEMENT

This is a proceeding, under Section 5 of the Federal Trade Commission Act, charging petitioners with unfair competition and deceptive acts and practices in the sale of lubricating oil re-refined from used oil. Petitioners' oil is sold in containers of the same general size, kind and appearance as those used for oil refined from crude oil, without any disclosure, either in advertising or on the containers, as to the source of such oil.

Petitioners are engaged in the business of producing motor lubricating oil by cleaning, reprocessing and re-refining used motor oil obtained from automobile crankcase drainings and other sources. The used oil is subjected to a series of processes designed to remove the impurities accumulated during its prior use. Sometimes, in order to meet varying viscosity requirements, petitioners blend the oil thus produced with oils refined from crude oil. The oil is then sold in interstate commerce to jobbers and retailers for resale to the public in one-quart and two-gallon containers and in bulk under various brand names. Petitioners' sales in interstate commerce are substantial and petitioners compete with various other manufacturers of lubricating oil.

No writing appears on the containers in which petitioners' products are distributed, stating or suggesting in any manner that the oil has been processed in

whole or in part from previously used oil (R. 37). The containers are like those used by refiners of crude oil, and the oil itself is indistinguishable in appearance from oil refined from crude (*ibid.*).

Undisputed testimony in the Commission hearings indicated that both jobbers (R. 137) and retail dealers (R. 45, 67, 170), as well as members of the purchasing public (R. 183, 186), were led to believe that they were purchasing oil refined from crude oil when they bought petitioners' products. The evidence at the hearing also made clear, as both the examiner (R. 33) and the Commission (R. 38) found, that members of the consuming public, as well as retail dealers who advise the public regarding the purchase of motor oil (R. 289, 316–317), prefer oil refined from crude oil to oil re-refined from used oil (R. 44–45, 67, 136, 158, 171). There was no "charge or implication" in the record that the motor oil produced by the petitioners from used oil was inferior to that produced from crude oil (Pet. 3a).[2]

Upon the basis of this evidence, the examiner found that the petitioners had "deceived and misled" many purchasers into buying their oil in the belief that it

[2] The examiner rejected evidence relied upon to show that crude and re-refined oil cannot be differentiated from a laboratory or specification standpoint, that the oil industry generally does not disclose the nature or geographic source of its raw materials, and that the source is not regarded in the trade as relevant to the oil's quality and value (R. 34, 242–243). The Commission upheld this exclusion on the ground that the quality of the petitioners' oil was not material to the issue of public preference for new or crude oil or to whether the public was deceived in the exercise of this preference (R. 40). The Court of Appeals expressly concurred (Pet. 6a).

had been refined from crude oil and that this action had "unfairly" diverted a substantial amount of business to petitioners (R. 35). The Commission unanimously adopted the examiner's findings and conclusions, although it modified his proposed cease and desist order in particulars not relevant here (R. 37–41).

The Court of Appeals, affirming the order of the Commission, found that (263 F. 2d 818, 820–821):

> The evidence shows also that without notification to the trade and to the customer that the petitioners' oil was not manufactured from crude oil, virgin oil, many persons in the trade and individual customers thought that the petitioners' product was manufactured from crude oil. The record proves further that such persons preferred to distribute and sell and to buy lubricating oil manufactured from crude oil or virgin oil, and not oil re-refined from crankcase oil, and thought that they were doing so. Accordingly, there was sufficient evidence upon which the Commission could find that dealers and the purchasing public were misled by a mistaken belief that petitioners' products were derived from crude oil.

The court also held (263 F. 2d at 821) that it was "beside the point" that "petitioners' oil is as satisfactory for lubricating purposes as [that] produced from crude oil" since "[a] manufacturer may not surreptitiously substitute his judgment for that of the purchaser as to the article to be purchased, even if the manufacturer's judgment is equal or even superior to that of the dealer or the customer. * * * The

public has the right to purchase motor oil manufactured from crude oil, if it desires to do so, and that desire may not be balked by a failure to disclose pertinent facts."

ARGUMENT

This case, one of a series in which the courts of appeals have uniformly affirmed Commission determinations that failure to disclose the used-oil source of motor oils offered for public sale violates Section 5 of the Federal Trade Commission Act,[3] involves no novel or significant question of law warranting review by this Court.

As petitioners concede, misrepresentation can flow from failure to speak as well as from affirmative misstatement. See *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 58 (C.A. 4); *L. Heller & Son, Inc.* v. *Federal Trade Commission*, 191 F. 2d 954 (C.A. 7). They also agree (Pet. 8) that a misrepresentation is no less a violation of the Act because the quality of the misrepresented goods equals that of the product which the public believes it is being offered. See *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67. Their case thus comes down to the suggestion that there was no adequate showing that the public's purchasing habits were influenced by the misrepresentation. But this contention cannot stand against the Court of Appeals'

[3] See *Royal Oil Corp.* v. *Federal Trade Commission*, 262 F. 2d 741 (C.A. 4); *Frank A. Kerran, etc., d/b/a Double Eagle Refining Co.* v. *Federal Trade Commission*, 265 F. 2d 246 (C.A. 10); petition for a writ of certiorari pending, No. 425, this Term.

express holding (affirming the similar findings of the Commission (R. 38) and its examiner (R. 33)) that "the record amply demonstrates a desire on the part of [some of] the dealers and purchasing public not to dispense or buy motor oils re-refined from crankcase drainings" (Pet. 6a).

Nor is there any substance to the charge that the Commission decision, as affirmed by the court below, converts Section 5 of the Act into a "super-labeling act" authorizing the Commission to require a manufacturer to provide information on any matter in which a consumer might be deemed to have an interest (Pet. 11). The Commission's determination rests upon the narrow proposition that petitioners' silence as to the used-oil origin of the product resulted in a misrepresentation of "a fact highly material and consequential to users and dealers in motor oil" (R. 39).

Finally, there is no merit to petitioners' contention that the Commission could not properly find it in the public interest to protect a consumer's preference for motor oil derived from crude oil since there was no factual basis for the preference. As Mr. Justice Cardozo, speaking for a unanimous Court, stated in *Federal Trade Commission* v. *Algoma Lumber Co.*, *supra* at 78:

> * * * The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. * * * In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the customer. Dealers and

> manufacturers are prejudiced when orders that would have come to them * * * are diverted to others whose methods are less scrupulous. * * *

If, as petitioners assert, oil refined from used oil is as satisfactory as that produced from crude oil, they are at liberty to accompany disclosure of the nature of their product with appropriate assertions or proof as to its quality. As the court below put it, "[a] manufacturer may not surreptitiously substitute his judgment for that of the purchaser as to the article to be purchased, even if the manufacturer's judgment is equal or even superior to that of the dealer or the customer." (Pet. 5a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1959.

U.S. GOVERNMENT PRINTING OFFICE 1959